Public Prosecutor v Puspanathan a/l Sinnasamy & Ors

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 41–65–91
MOHD HISHAMUDIN J
10 JANUARY 1996

Criminal Procedure *— Charge — Alteration or amendment of — Trial on amended charge ordered — Whether there were sufficient grounds for the magistrate to commit case to High Court on charge of murder — Whether there was requirement for the prosecution to prove which of the co-accused inflicted the fatal blow*

Criminal Procedure *— Preliminary inquiry — Whether apparent discrepencies in evidence should be left to assessment of trial judge — Whether prosecution need to adduce evidence beyond reasonable doubt at this stage — Whether only required to adduce sufficient evidence to identify body of deceased*

The six respondents were tentatively charged at the magistrates' court with murder under s 302 of the Penal Code (FMS Cap 45) ('the Code'), but at the end of the preliminary inquiry, the magistrate decided not to commit them to the High Court for trial but amended the charge to one of possession of weapons at a riot under s 148 of the Code. The Public Prosecutor appealed.

Held, allowing the appeal and ordering that the case be committed to the High Court for trial on the original charge of murder:

(1) There were sufficient grounds for the magistrate to commit the case to the High Court on a charge of murder. The direct evidence showed that a number of witnesses saw the six accused persons attack the deceased with various types of dangerous weapons, and the doctor's evidence confirmed that the deceased died because of a head injury which could have been caused by a heavy and hard object (see p 168A–D).

(2) There was no requirement for the prosecution to prove which of the co-accused inflicted the fatal blow. So long as it was shown that the criminal act was done by one of the assailants in furtherance of a common intention of all, then liability for the crime would be imposed on any one of the persons in the same manner as if the act were done by him alone (see p 168E–H; *Yau Heng Fang v PP* [1985] 2 MLJ 335 followed).

(3) The apparent discrepancies in the evidence of the prosecution witnesses were bound to exist in a case such as this and there was credible evidence which, if believed, would sustain a conviction. Therefore, the magistrate should have committed the case to the High Court and not have undertaken to assess the discrepancies. The assessment of apparent discrepancies and the weighing of testimony should have been left to the judge of the High Court

trying the case (see p 169B–D; *Re Chow Kim Lin* [1963] MLJ 130 followed, *Muniandy v PP* [1966] 1 MLJ 257 distinguished. A

(4) For the purposes of the preliminary inquiry, the prosecution was only required to adduce sufficient evidence identifying the body of the deceased, and was not required to prove this beyond reasonable doubt. In a criminal trial, as opposed to a mere preliminary inquiry, the standard of proof is higher (see p 169E–F, H–I; *Teay Wah Cheong v PP* [1964] MLJ 21 and *Fazal Din v PP* [1949] MLJ 123 distinguished). B

[*Editorial note*: The respondents have referred a point of law to the Court of Appeal vide Criminal Application K–07–11–95.] C

[Bahasa Malaysia summary

Keenam-enam responden buat sementara waktu telah dituduh di mahkamah majistret atas kesalahan membunuh di bawah s 302 Kanun Keseksaan (NMB Bab 6) ('Kanun itu'), tetapi di akhir siasatan permulaan, majistret memutuskan tidak menghantar mereka ke Mahkamah Tinggi untuk perbicaraan tetapi telah meminda pertuduhan itu kepada milikan senjata semasa rusuhan di bawah s 148 Kanun itu. Pendakwa Raya merayu terhadap keputusan itu. D

Diputuskan, membenarkan rayuan itu dan mengarahkan kes itu dihantar ke Mahkamah Tinggi untuk perbicaraan di atas pertuduhan membunuh: E

(1) Terdapat alasan-alasan yang mencukupi untuk majistret menghantarkan kes itu ke Mahkamah Tinggi di atas pertuduhan membunuh. Keterangan langsung menunjukkan bahawa terdapat beberapa saksi yang nampak keenam-enam tertuduh menyerang simati dengan beberapa jenis senjata berbahaya, dan keterangan doktor mengesahkan bahawa simati meninggal dunia kerana kecederaan di kepala yang mungkin disebabkan oleh sesuatu objek yang berat dan keras (lihat ms 168A–D). F G

(2) Tidak terdapat keperluan untuk pendakwaan membuktikan siapa di antara tertuduh bersama yang telah menyebabkan pukulan yang membawa maut itu. Asalkan dapat ditunjukkan bahawa tindakan jenayah itu dibuat oleh salah seorang daripada penyerang itu mengikut niat bersama kesemua mereka, maka liabiliti untuk jenayah itu boleh dikenakan ke atas mana-mana satu daripada mereka dalam cara yang sama jika tindakan itu telah dibuatnya sendiri (lihat ms 168E–H; *Yau Heng Fang v PP* [1985] 2 MLJ 335 diikut). H

(3) Perselisihan yang nyata dalam keterangan saksi-saksi pendakwaan akan sememangnya wujud dalam kes seperti ini dan terdapat keterangan yang boleh dipercayai yang, jika dipercayai, akan menyokong sabitan. Oleh itu, majistret di sini sepatutnya menghantar kes ini ke Mahkamah Tinggi dan tidak patut I

menjalankan penilaian ke atas perselisihan itu. Penilaian perselisihan yang nyata dan penimbangan testimoni patut ditinggalkan kepada hakim Mahkamah Tinggi yang akan membicarakan kes itu (lihat ms 169B–D; *Re Chow Kim Lin* [1963] MLJ 130 diikut, *Muniandy v PP* [1966] 1 MLJ 257 dibeza).

(4) Untuk tujuan siasatan permulaan, pendakwaan hanya dikehendaki mengemukakan keterangan yang mencukupi untuk mengecam mayat simati itu, dan tidak perlu membuktikan fakta ini melebihi keraguan munasabah. Dalam perbicaraan jenayah, berlainan daripada siasatan permulaan semata-mata, taraf pembuktian adalah lebih tinggi (lihat ms 169E–F, H–I; *Yau Heng Fang v PP* [1985] 2 MLJ 335 dan *Fazal Din v PP* [1949] MLJ 123 dibeza).]

Notes

For cases on alteration or amendment of charges, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 615–656.

For cases on preliminary inquiries, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1975–2004.

Cases referred to

Chow Kim Lin, Re [1963] MLJ 130
Fazal Din v PP [1949] MLJ 123
Muniandy v PP [1966] 1 MLJ 257
Queen Empress v Namdev Satvaji ILR 11 Bom 372
Teay Wah Cheong v PP [1964] MLJ 21
Yau Heng Fang v PP [1985] 2 MLJ 335

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 140(1)(a), 399(1)(a)
Penal Code (FMS Cap 45) ss 148, 302

Azmi Ariffin (Deputy Public Prosecutor) for the appellant.
Sithhambaram Vairavan (*Kumar, Sitham & Co*) for the respondents.

Mohd Hishamudin J: The six respondents were tentatively jointly charged at the magistrates' court with the offence of murder under s 302 of the Penal Code (FMS Cap 45) ('the Code'), but at end of the preliminary inquiry ('PI'), the magistrate who conducted the inquiry decided not to commit them to the High Court for trial, instead, in a purported exercise of power under s 140(1)(a) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), he amended the charge to s 148 of the Code and called upon the accused to plead thereto. The prosecution appealed.

After hearing submissions of both sides, I allowed the appeal of the Public Prosecutor.

My decision is based on the following grounds.

First, I was satisfied from the records of the PI that there were sufficient grounds for the learned magistrate to commit the case to the High Court on a charge of murder. There was direct evidence adduced by the prosecution to the effect that the six accused attacked the deceased with various types of dangerous weapons such as sickles (pisau sabit) and iron pipes. There were eye witnesses and they all gave evidence in court of what they saw on the day in question. They saw all the six accused using dangerous weapons to inflict injuries on the head and on the other parts of the body of the deceased. These witnesses were deponent 6 ('Letchumanan'), deponent 7 ('Manickam'), deponent 9 ('Rajamah') and deponent 10 ('Dewi'). Deponent 12 ('Insp Abdul Aziz'), who was the investigating officer, testified that at the scene of the alleged crime he recovered several sickles and wooden poles (P2–P8). And there was also the evidence of the doctor, deponent 13 ('Dr Khaw'), who conducted the post-mortem and who confirmed that the deceased died because of an injury to the head and that the injury could have been caused by a heavy and hard object.

Secondly, with respect, the learned magistrate misdirected himself when he said in his grounds of judgment:

> Persoalannya, siapakah orang yang disyaki yang telah mendatangkan kecederaan yang menyebabkan simati menemui kecederaan sehingga simati menemui ajalnya? Mahkamah perlu memutuskan perkara ini sebelum memutuskan ada atau tidak kes untuk dijawab di Mahkamah Tinggi.

In the present case, there is no requirement for the prosecution to prove which of the co-accused inflicted the fatal blow. According to Ratanlal and Dhirailal on the *Law of Crimes* (20th Ed, 1961) at p 63:

> Scope — This section [s 34, Penal Code] is restricted to common intention and does not embrace any knowledge. It does not require proof that any particular accused was responsible for the commission of the actual offence.

And in *Yau Heng Fang v PP* [1985] 2 MLJ 335, Mohamed Azmi SCJ ruled at p 338:

> However, since the charge — both original and amended — against the appellant had reference to s 34 of the Penal Code, it is unnecessary for the prosecution to prove which particular stab wounds were inflicted by which assailant. So long as it is shown that the criminal act was done by one of the assailants in furtherance of a common intention of all, then liability for the crime would be imposed on any one of the persons in the same manner as if the act were done by him alone (see *Mahbub Shah v King Emperor* AIR 1945 PC 118).

Turning to another point, it is true, as learned counsel for the respondents submitted, that there were discrepancies in the evidence of the prosecution witnesses, and the learned magistrate, in his decision not to commit the six accused for trial on a charge of murder, appears to have been influenced by this factor when he said:

A Di dalam kes *Muniandy & Ors v PP* [1966] 1 MLJ 257, telah diputuskan bahawa apabila keterangan saksi-saksi pendakwaan dan keterangan doktor didapati tidak selaras maka sabitan haruslah diketepikan.

However, with respect, *Muniandy* is irrelevant for the facts of that case do not concern a preliminary inquiry and, secondly, in any event, the judgment B of Ong Hock Thye FJ (as he then was) in that case does not appear to have enunciated such a 'principle' as suggested by the learned magistrate.

In my view, the apparent discrepencies were bound to exist especially in such a case as the one that is now before the court. Upon examining the depositions, to my mind, the eye-witnesses, the investigating officer and C the doctor are credible witnesses whose evidence, if believed, would sustain a conviction. As such the learned magistrate should not have arrogated to himself the task of assessing the discrepencies; instead, he ought to have committed the case, and the assessment of apparent discrepancies and the weighing of the testimony should be left to the judge of the High Court, who would be trying the case. The principles had been clearly laid down D by Ong J (as he then was) in *Re Chow Kim Lin* [1963] 29 MLJ 130 (a case which cited with approval the decision of West J in *Queen Empress v Namdev Satvaji* ILR 11 Bom 372).

On the question of the identification of the body of the deceased, as raised by learned counsel for the respondents, here again, for the purpose E of the inquiry, the prosecution was not required to prove this point beyond reasonable doubt, the prosecution only need to adduce sufficient evidence, and I think there are sufficient grounds to show that the body examined by Dr Khaw on 20 August 1988 (ie at 10.30am, the following morning) was that of the deceased in question and not that of another person. Dr Khaw gave evidence (which was not challenged) that the body that he examined F on the day in question was that of one Sechitanathan a/l Subramaniam ('Sechitanathan'), a male Indian. There was also his medical report ('P60') which stated the name of the deceased as Sechitanathan a/l Subramaniam, identified to him by the investigating officer, and p 153 of the PI record shows that s 399(1)(a) of the CPC had been complied with — hence P60 G was admissible. There was also the evidence of Insp Abdul Aziz , who deposed that the deceased Sechitanathan was sent to the Hospital Besar Pulau Pinang, and this Insp Abdul Aziz was also present on 20 August 1988 when Dr Khaw did the post-mortem on the deceased Sechitanathan. He caused photographs of the deceased to be taken before and during post-mortem, and at the inquiry he identified the deceased in those H photographs ('P37A–P37G'). His evidence too was unchallenged. With respect to learned counsel, the case of *Teay Wah Cheong v PP* [1964] MLJ 21 and the case of *Fazal Din v PP* [1949] MLJ 123, cited by him in support of his contention on the lack of positive identification, were irrelevant because these cases concerned criminal trials and not preliminary I inquiries. In a criminal trial (as opposed to a mere preliminary inquiry), the standard of proof is higher.

I accordingly set aside the order of the learned magistrate, and ordered that he commit the case to the High Court for trial on the original charge of murder.

Order accordingly.

Reported by AP Kinnear